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2  
3 UNITED STATES DISTRICT COURT  
4 EASTERN DISTRICT OF WASHINGTON

5 ADAM S. DONOVAN, )  
6 Plaintiff, ) No. CV-09-121-JPH  
7 v. ) ORDER GRANTING DEFENDANT'S  
8 MICHAEL J. ASTRUE, Commissioner ) MOTION FOR SUMMARY JUDGMENT  
9 of Social Security, )  
10 Defendant. )  
11 )

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12 BEFORE THE COURT are cross-motions for summary judgment noted  
13 for hearing without oral argument on May 7, 2010 (Ct. Rec. 20,  
14 23). Attorney Maureen J. Rosette represents plaintiff; Special  
15 Assistant United States Attorney Nancy Mishalanie represents the  
16 Commissioner of Social Security (Commissioner). The parties  
17 consented to proceed before a magistrate judge (Ct. Rec. 8).  
18 Plaintiff filed a reply on March 15, 2010 (Ct. Rec. 25). After  
19 reviewing the administrative record and the briefs filed by the  
20 parties, the court **GRANTS** Defendant's Motion for Summary Judgment  
21 (Ct. Rec. 23) and **DENIES** Plaintiff's Motion for Summary Judgment  
22 (Ct. Rec. 20).

23 **JURISDICTION**

24 Plaintiff protectively applied for supplemental security  
25 income (SSI) and disability insurance benefits (DIB) on March 15,  
26 2006, alleging onset as of November 18, 2000 (Tr. 149-159). The  
27 applications were denied initially and on reconsideration (Tr.  
28

1 108-115, 117-124). Administrative Law Judge (ALJ) R.S. Chester  
2 held a hearing on August 14, 2008 (Tr. 32-100). Plaintiff,  
3 represented by counsel, medical expert James Haynes, M.D.,  
4 psychologist Allen Bostwick, Ph.D., and vocational expert Daniel  
5 McKinney testified (Tr. 32-100). On September 17, 2008, the ALJ  
6 issued a decision (Tr. 15-29) finding plaintiff is disabled when  
7 substance abuse is included (Tr. 24). The ALJ found DAA is a  
8 contributing factor material to plaintiff's disability  
9 determination (Tr. 29). When DAA is excluded, plaintiff cannot  
10 perform past relevant work but could perform other jobs, meaning  
11 he is not disabled (Tr. 27-29). Accordingly, the ALJ found  
12 plaintiff not disabled (Tr. 29). The Appeals Council denied review  
13 on February 17, 2009 (Tr. 1-3). Therefore, the ALJ's decision  
14 became the final decision of the Commissioner, which is appealable  
15 to the district court pursuant to 42 U.S.C. § 405(g). Plaintiff  
16 filed this action for judicial review pursuant to 42 U.S.C. §  
17 405(g) on April 20, 2009 (Ct. Recs. 1,4).

#### 18 **STATEMENT OF FACTS**

19 The facts have been presented in the administrative hearing  
20 transcript, the ALJ's decision, referred to as necessary in the  
21 briefs of both plaintiff and the Commissioner, and will be  
22 summarized here.

23 Plaintiff was 27 years old at the time of the hearing (Tr.  
24 50). He earned a high school equivalency certificate and completed  
25 a year of college (Tr. 55, 173). Mr. Donovan has held the jobs of  
26 fast food worker, fast food cook, drywall applicator, and material  
27 handler (Tr. 58-59, 61,91-94). He alleges disability since  
28 November 18, 2000, when he was nineteen years old, due to

1 degenerative arthritis and gout (Tr. 166). He last worked in  
2 December 2005. Mr. Donovan has alleged he is unable to work due to  
3 pain in his fingers, elbows, knees, and feet. His hands are stiff  
4 with limited range of motion and he is "in severe pain all the  
5 time" (Tr. 166).

6 Plaintiff alleges the ALJ erred when he weighed the opinions  
7 of examining and testifying professionals and assessed  
8 credibility (Ct. Rec. 21 at 15-22). The Commissioner asserts the  
9 ALJ's decision should be affirmed because it free of error and  
10 supported by the evidence (Ct. Rec. 24 at 8).

#### 11 SEQUENTIAL EVALUATION PROCESS

12 The Social Security Act (the Act) defines "disability"  
13 as the "inability to engage in any substantial gainful activity by  
14 reason of any medically determinable physical or mental impairment  
15 which can be expected to result in death or which has lasted or  
16 can be expected to last for a continuous period of not less than  
17 twelve months." 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). The Act  
18 also provides that a Plaintiff shall be determined to be under a  
19 disability only if any impairments are of such severity that a  
20 plaintiff is not only unable to do previous work but cannot,  
21 considering plaintiff's age, education and work experiences,  
22 engage in any other substantial gainful work which exists in the  
23 national economy. 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B). Thus,  
24 the definition of disability consists of both medical and  
25 vocational components. *Edlund v. Massanari*, 253 F.3d 1152, 1156  
26 (9<sup>th</sup> Cir. 2001).

27 The Commissioner has established a five-step sequential  
28 evaluation process for determining whether a person is disabled.

1 20 C.F.R. §§ 404.1520, 416.920. Step one determines if the person  
2 is engaged in substantial gainful activities. If so, benefits are  
3 denied. 20 C.F.R. §§ 404.1520(a)(4)(i), 416.920(a)(4)(i). If not,  
4 the decision maker proceeds to step two, which determines whether  
5 plaintiff has a medically severe impairment or combination of  
6 impairments. 20 C.F.R. §§ 404.1520(a)(4)(ii), 416.920(a)(4)(ii).

7 If plaintiff does not have a severe impairment or combination  
8 of impairments, the disability claim is denied. If the impairment  
9 is severe, the evaluation proceeds to the third step, which  
10 compares plaintiff's impairment with a number of listed  
11 impairments acknowledged by the Commissioner to be so severe as to  
12 preclude substantial gainful activity. 20 C.F.R. §§  
13 404.1520(a)(4)(ii), 416.920(a)(4)(ii); 20 C.F.R. § 404 Subpt. P.  
14 App. 1. If the impairment meets or equals one of the listed  
15 impairments, plaintiff is conclusively presumed to be disabled. If  
16 the impairment is not one conclusively presumed to be disabling,  
17 the evaluation proceeds to the fourth step, which determines  
18 whether the impairment prevents plaintiff from performing work  
19 which was performed in the past. If a plaintiff is able to perform  
20 previous work, that Plaintiff is deemed not disabled. 20 C.F.R. §§  
21 404.1520(a)(4)(iv), 416.920(a)(4)(iv). At this step, plaintiff's  
22 residual functional capacity ("RFC") assessment is considered. If  
23 plaintiff cannot perform this work, the fifth and final step in  
24 the process determines whether plaintiff is able to perform other  
25 work in the national economy in view of plaintiff's residual  
26 functional capacity, age, education and past work experience. 20  
27 C.F.R. §§ 404.1520(a)(4)(v), 416.920(a)(4)(v); *Bowen v. Yuckert*,  
28 482 U.S. 137 (1987).

1 The initial burden of proof rests upon plaintiff to establish  
2 a *prima facie* case of entitlement to disability benefits.  
3 *Rhinehart v. Finch*, 438 F.2d 920, 921 (9<sup>th</sup> Cir. 1971); *Meanel v.*  
4 *Apfel*, 172 F.3d 1111, 1113 (9<sup>th</sup> Cir. 1999). The initial burden is  
5 met once plaintiff establishes that a physical or mental  
6 impairment prevents the performance of previous work. The burden  
7 then shifts, at step five, to the Commissioner to show that (1)  
8 plaintiff can perform other substantial gainful activity and (2) a  
9 "significant number of jobs exist in the national economy" which  
10 plaintiff can perform. *Kail v. Heckler*, 722 F.2d 1496, 1498 (9<sup>th</sup>  
11 Cir. 1984).

12 Plaintiff has the burden of showing that drug and alcohol  
13 addiction (DAA) is not a contributing factor material to  
14 disability. *Ball v. Massanari*, 254 F.3d 817, 823 (9<sup>th</sup> Cir. 2001).  
15 The Social Security Act bars payment of benefits when drug  
16 addiction and/or alcoholism is a contributing factor material to a  
17 disability claim. 42 U.S.C. §§ 423 (d)(2)(C) and 1382(a)(3)(J);  
18 *Bustamante v. Massanari*, 262 F.3d 949 (9<sup>th</sup> Cir. 2001); *Sousa v.*  
19 *Callahan*, 143 F.3d 1240, 1245 (9<sup>th</sup> Cir. 1998). If there is  
20 evidence of DAA and the individual succeeds in proving disability,  
21 the Commissioner must determine whether DAA is material to the  
22 determination of disability. 20 C.F.R. §§ 404.1535 and 416.935. If  
23 an ALJ finds that the claimant is not disabled, then the claimant  
24 is not entitled to benefits and there is no need to proceed with  
25 the analysis to determine whether substance abuse is a  
26 contributing factor material to disability. However, if the ALJ  
27 finds that the claimant is disabled, then the ALJ must proceed to  
28 determine if the claimant would be disabled if he or she stopped

1 using alcohol or drugs.

## 2 STANDARD OF REVIEW

3 Congress has provided a limited scope of judicial review of a  
 4 Commissioner's decision. 42 U.S.C. § 405(g). A Court must uphold  
 5 the Commissioner's decision, made through an ALJ, when the  
 6 determination is not based on legal error and is supported by  
 7 substantial evidence. *See Jones v. Heckler*, 760 F.2d 993, 995 (9<sup>th</sup>  
 8 Cir. 1985); *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9<sup>th</sup> Cir. 1999).  
 9 "The [Commissioner's] determination that a plaintiff is not  
 10 disabled will be upheld if the findings of fact are supported by  
 11 substantial evidence." *Delgado v. Heckler*, 722 F.2d 570, 572 (9<sup>th</sup>  
 12 Cir. 1983) (*citing* 42 U.S.C. § 405(g)). Substantial evidence is  
 13 more than a mere scintilla, *Sorenson v. Weinberger*, 514 F.2d 1112,  
 14 1119 n. 10 (9<sup>th</sup> Cir. 1975), but less than a preponderance.  
 15 *McAllister v. Sullivan*, 888 F.2d 599, 601-602 (9<sup>th</sup> Cir. 1989);  
 16 *Desrosiers v. Secretary of Health and Human Services*, 846 F.2d  
 17 573, 576 (9<sup>th</sup> Cir. 1988). Substantial evidence "means such  
 18 evidence as a reasonable mind might accept as adequate to support  
 19 a conclusion." *Richardson v. Perales*, 402 U.S. 389, 401 (1971)  
 20 (citations omitted). "[S]uch inferences and conclusions as the  
 21 [Commissioner] may reasonably draw from the evidence" will also be  
 22 upheld. *Mark v. Celebrezze*, 348 F.2d 289, 293 (9<sup>th</sup> Cir. 1965). On  
 23 review, the Court considers the record as a whole, not just the  
 24 evidence supporting the decision of the Commissioner. *Weetman v.*  
 25 *Sullivan*, 877 F.2d 20, 22 (9<sup>th</sup> Cir. 1989) (*quoting Kornock v.*  
 26 *Harris*, 648 F.2d 525, 526 (9<sup>th</sup> Cir. 1980)).

27 It is the role of the trier of fact, not this Court, to  
 28 resolve conflicts in evidence. *Richardson*, 402 U.S. at 400. If

1 evidence supports more than one rational interpretation, the Court  
2 may not substitute its judgment for that of the Commissioner.  
3 *Tackett*, 180 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579  
4 (9<sup>th</sup> Cir. 1984). Nevertheless, a decision supported by substantial  
5 evidence will still be set aside if the proper legal standards  
6 were not applied in weighing the evidence and making the decision.  
7 *Browner v. Secretary of Health and Human Services*, 839 F.2d 432,  
8 433 (9<sup>th</sup> Cir. 1987). Thus, if there is substantial evidence to  
9 support the administrative findings, or if there is conflicting  
10 evidence that will support a finding of either disability or  
11 nondisability, the finding of the Commissioner is conclusive.  
12 *Sprague v. Bowen*, 812 F.2d 1226, 1229-1230 (9<sup>th</sup> Cir. 1987).

#### 13 **ALJ'S FINDINGS**

14 At the onset the ALJ found Mr. Donovan was insured for DIB  
15 purposes through September 30, 2003 (Tr. 15, 17). At step one ALJ  
16 Chester found plaintiff did not engage in substantial gainful  
17 activity after onset (Tr. 18). At steps two and three, he found  
18 plaintiff suffers from gout, arthritis, diabetes mellitus type II,  
19 history of pulmonary embolism on coumadin therapy, mood disorder  
20 due to chronic pain, personality disorder NOS with narcissistic  
21 and antisocial traits, and polysubstance abuse (prescription  
22 medication, THC, and methamphetamine)( Tr. 18), impairments that  
23 equal Listings 14.09 and 12.09 (Tr. 24). The ALJ found plaintiff  
24 less than completely credible (Tr. 26). When DAA is included, the  
25 ALJ found plaintiff disabled at step three (Tr. 24). He found if  
26 Mr. Donovan stopped abusing substances, he would still have severe  
27 but not Listing-level impairments (Tr. 24-25). The ALJ found at  
28 step four if plaintiff stopped abusing substances, he would be

1 unable to perform his past work. At step five he found Mr. Donovan  
2 could perform other jobs (Tr. 25, 27-28). The ALJ found DAA was a  
3 contributing factor material to the disability determination (Tr.  
4 29). Accordingly, he found plaintiff is barred from receiving  
5 benefits and therefore not disabled as defined by the Social  
6 Security Act (Tr. 29).

#### 7 **ISSUES**

8 Plaintiff contends the Commissioner erred as a matter of law  
9 when he erroneously weighed the opinions of examining and  
10 testifying professionals and when he assessed Mr. Donovan's  
11 credibility, errors he alleges lead the ALJ to wrongly conclude  
12 DAA materially contributes to plaintiff's disability finding (Ct.  
13 Rec. 21 at 15-22). The Commissioner asserts the Court should  
14 affirm the ALJ's decision because it is without error and  
15 supported by the evidence (Ct. Rec. 24 at 8).

#### 16 **DISCUSSION**

##### 17 **A. Weighing medical evidence**

18 In social security proceedings, the claimant must prove the  
19 existence of a physical or mental impairment by providing medical  
20 evidence consisting of signs, symptoms, and laboratory findings;  
21 the claimant's own statement of symptoms alone will not suffice.  
22 20 C.F.R. § 416.908. The effects of all symptoms must be evaluated  
23 on the basis of a medically determinable impairment which can be  
24 shown to be the cause of the symptoms. 20 C.F.R. § 416.929. Once  
25 medical evidence of an underlying impairment has been shown,  
26 medical findings are not required to support the alleged severity  
27 of symptoms. *Bunnell v. Sullivan*, 947 F.2d 341, 345 (9<sup>th</sup> Cr.  
28 1991).



1 A treating physician's opinion is given special weight  
2 because of familiarity with the claimant and the claimant's  
3 physical condition. *Fair v. Bowen*, 885 F.2d 597, 604-605 (9<sup>th</sup> Cir.  
4 1989). However, the treating physician's opinion is not  
5 "necessarily conclusive as to either a physical condition or the  
6 ultimate issue of disability." *Magallanes v. Bowen*, 881 F.2d 747,  
7 751 (9<sup>th</sup> Cir. 1989) (citations omitted). More weight is given to a  
8 treating physician than an examining physician. *Lester v. Cater*,  
9 81 F.3d 821, 830 (9<sup>th</sup> Cir. 1995). Correspondingly, more weight is  
10 given to the opinions of treating and examining physicians than to  
11 nonexamining physicians. *Benecke v. Barnhart*, 379 F.3d 587, 592  
12 (9<sup>th</sup> Cir. 2004). If the treating or examining physician's opinions  
13 are not contradicted, they can be rejected only with clear and  
14 convincing reasons. *Lester*, 81 F. 3d at 830. If contradicted, the  
15 ALJ may reject an opinion if he states specific, legitimate  
16 reasons that are supported by substantial evidence. See *Flaten v.*  
17 *Secretary of Health and Human Serv.*, 44 F. 3d 1435, 1463 (9<sup>th</sup> Cir.  
18 1995).

19 In addition to the testimony of a nonexamining medical  
20 advisor, the ALJ must have other evidence to support a decision to  
21 reject the opinion of a treating physician, such as laboratory  
22 test results, contrary reports from examining physicians, and  
23 testimony from the claimant that was inconsistent with the  
24 treating physician's opinion. *Magallanes v. Bowen*, 881 F.2d 747,  
25 751-52 (9<sup>th</sup> Cir. 1989); *Andrews v. Shalala*, 53 F.3d 1042-43 (9<sup>th</sup>  
26 Cir. 1995).

#### 27 **B. Specific opinions**

28 Mr. Donovan asserts the ALJ erred by (1) failing to properly

1 credit the opinions of treating physician Christopher Goodwin,  
2 M.D. (May 2005) and examining psychologist Gerald Gardner, Ph.D.  
3 (May of 2008); (2) giving too much credit to the opinions of the  
4 testifying professionals, Allen Bostwick, Ph.D., and James Haynes,  
5 M.D.; (3) failing to credit Dr. Haynes's opinion plaintiff meets  
6 Listing 14.09, and (4) finding Mr. Donovan less than credible (Ct.  
7 Rec. 21 at 15-22; 25 at 1-4).

8 *1. Treating doctor Goodwin*

9 Plaintiff correctly observes in May of 2005, Dr. Goodwin  
10 opined Mr. Donovan was severely limited, unable to work, and not a  
11 drug seeker (Ct. Rec. 21 at 20, referring to Tr. 701). Plaintiff  
12 goes on to accurately point out Dr. Goodwin opined in May of 2007  
13 Mr. Donovan's gout is severe (Id., citing Tr. 705). In May of  
14 2005, Dr. Goodwin also assessed an RFC for sedentary work and  
15 noted plaintiff's poor compliance with treatment (Tr. 706).

16 The Commissioner correctly points out Dr. Goodwin had a less  
17 favorable opinion in December of 2006 (Ct. Rec. 24 at 12-13,  
18 citing Tr. 865). Dr. Goodwin states

19 Unfortunately, [plaintiff] has back-tracked  
20 significantly, all due to poor compliance and  
21 polysubstance abuse to the point that he now  
requiring short and long acting insulin for  
prednisone-induced diabetes.

22 . . . .

23 He admits to continuing problems with poor  
24 compliance. He continues to use street drugs  
intermittently stating he is using them for  
25 pain control. I confronted him on this  
statement as he had been using methamphetamine  
and marijuana recreationally back before pain  
was an issue.

26 . . . .

27 I would strongly recommend that he be considered  
28 for [an] inpatient drug rehab program. . . I  
firmly believe that with regular compliance and  
avoidance of substance abuse, he could get off

1 the prednisone and off the narcotics and manage  
2 his gout with allopurinol and colchicine, and thus  
would be able to get off the insulin as well.

3 (Tr. 865).

4 The ALJ opines examining doctor Michael Carraher, M.D.'s  
5 opinion is consistent with the opinions of both treating doctor  
6 Goodwin and testifying doctor Haynes (Tr. 23-24, referring to  
7 Exhibit 34F at Tr. 847-863; Tr. 79). The ALJ is correct.

8 Dr. Haynes testified if plaintiff became medication compliant  
9 and DAA is excluded, Mr. Donovan could perform a range of light  
10 work (Tr. 79). This is generally consistent with Dr. Goodwin's  
11 opinion most of plaintiff's medial problems are self-induced and  
12 would resolve with compliance (Tr. 865). The ALJ similarly found  
13 all three physicians opined plaintiff was unable to work with DAA  
14 included (Tr. 24), a finding fully supported by the record.

15 The ALJ properly weighed Dr. Goodwin's opinions.

16 *2. Examining psychologist Gardner*

17 Dr. Gardner examined plaintiff May 15, 2008 (Tr. 835-846),  
18 more than two years after Mr. Donovan applied for SSI and more  
19 than four years after his last insured date. Dr. Gardner opined  
20 plaintiff's assessed marked and moderate impairments "would appear  
21 to exist even without substance abuse," and [DAA] "[p]robably at  
22 times" contributes to the limitations, but "DAA does not appear to  
23 be primary at this point. This appears to be a very difficult pain  
24 management problem" (Tr. 843).

25 With respect to Dr. Gardner's contradicted opinion, Dr.  
26 Bostwick testified that only a few weeks before Gardner's  
27 evaluation, "narcotic abuse was noted to be a problem in terms of  
28 drug seeking behavior" (Tr. 48, citing Exhibit 36F, dated April

18, 2008 at Tr. 878,880).

To aid in weighing the conflicting medical evidence, the ALJ evaluated plaintiff's credibility and found him less than fully credible (Tr. 23-24, 26-27). Credibility determinations bear on evaluations of medical evidence when an ALJ is presented with conflicting medical opinions or inconsistency between a claimant's subjective complaints and diagnosed condition. See *Webb v. Barnhart*, 433 F.3d 683, 688 (9<sup>th</sup> Cir. 2005).

It is the province of the ALJ to make credibility determinations. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9<sup>th</sup> Cir. 1995). However, the ALJ's findings must be supported by specific cogent reasons. *Rashad v. Sullivan*, 903 F.2d 1229, 1231 (9<sup>th</sup> Cir. 1990). Once the claimant produces medical evidence of an underlying medical impairment, the ALJ may not discredit testimony as to the severity of an impairment because it is unsupported by medical evidence. *Reddick v. Chater*, 157 F.3d 715, 722 (9<sup>th</sup> Cir. 1998). Absent affirmative evidence of malingering, the ALJ's reasons for rejecting the claimant's testimony must be "clear and convincing." *Lester v. Chater*, 81 F.3d 821, 834 (9<sup>th</sup> Cir. 1995). "General findings are insufficient: rather the ALJ must identify what testimony not credible and what evidence undermines the claimant's complaints." *Lester*, 81 F.3d at 834; *Dodrill v. Shalala*, 12 F.3d 915, 918 (9<sup>th</sup> Cir. 1993).

The court agrees with the Commissioner that even with some evidence of malingering, the ALJ nonetheless gave clear and convincing reasons for discrediting plaintiff's credibility (Ct. Rec. 24 at 15, referring to Tr. 26-27).

The ALJ relied on (1) failure to follow prescribed courses of

1 treatment; (2) untruthfulness about substance abuse and drug  
2 seeking behavior; and (3) inconsistent statements when he assessed  
3 plaintiff's credibility (Tr. 26-27). Each is clear, convincing and  
4 supported by the record.

5 Failing to follow a prescribed course of treatment can cast  
6 doubt on a claimant's sincerity. *Fair v. Bowen*, 885 F.2d 597,603  
7 (9<sup>th</sup> Cir. 1989); *Thomas v. Barnhart*, 278 F.3d 947,958-959 (9<sup>th</sup> Cir.  
8 2002). The ALJ accurately observes the record is replete with  
9 plaintiff's noncompliance with medical treatment (Tr. 20). The ALJ  
10 points out in May of 2005, plaintiff was out of necessary  
11 medications for a month (Id; Exhibit 11F at Tr. 422). He observes  
12 in March of 2006, plaintiff "was not taking his chronic  
13 medications right and did not keep appointments with specialists"  
14 (Tr. 20-21), citing Exhibit 16F at Tr. 548,551,558-561). The  
15 record contains many more instances of plaintiff's noncompliance  
16 with treatment for both gout and diabetes.

17 Untruthfulness about substance abuse and drug seeking  
18 behavior are clear and convincing reasons to reject a claimant's  
19 testimony. *Verduzco v. Apfel*, 188 F.3d 1087,1090 (9<sup>th</sup> Cir. 1999);  
20 *Edlund v. Massanari*, 253 F.3d at 1157-1158. The Commissioner  
21 correctly points out emergency room records from October of 2007  
22 [among others] reflect drug-seeking behavior over several months  
23 (Ct. Rec. 24 at 13, n2 citing Tr. 756).

24 Inconsistent statements detract from credibility. *Thomas v.*  
25 *Barnhart*, 278 F.3d 947, 958-959 (9<sup>th</sup> Cir. 2002). The ALJ notes  
26 plaintiff gave contradictory histories to ER personnel (Tr. 27,  
27 referring to Tr. 818-819). The record supports the ALJ's reason.  
28 On February 6, 2008, ER physician Christopher Tillis, M.D., notes

1 plaintiff initially complained he dislocated his right knee. After  
2 Dr. Tillis asked Mr. Donovan about his recent ER visit for  
3 problems with gout in the right knee, plaintiff admitted "it was  
4 actually diagnosed as gout" (Tr. 819).

5 The ALJ's reasons for finding plaintiff less than fully  
6 credible are clear, convincing, and fully supported by the record.  
7 *See Thomas*, 278 F.3d at 958-959 (proper factors include  
8 inconsistencies in plaintiff's statements, inconsistencies between  
9 statements and conduct, and extent of daily activities).

10 The ALJ is responsible for reviewing the evidence and  
11 resolving conflicts or ambiguities in testimony. *Magallanes v.*  
12 *Bowen*, 881 F.2d 747, 751 (9<sup>th</sup> Cir. 1989). It is the role of the  
13 trier of fact, not this court, to resolve conflicts in evidence.  
14 *Richardson*, 402 U.S. at 400. The court has a limited role in  
15 determining whether the ALJ's decision is supported by substantial  
16 evidence and may not substitute its own judgment for that of the  
17 ALJ, even if it might justifiably have reached a different result  
18 upon de novo review. 42 U.S.C. § 405 (g).

19 The record shows the ALJ's credibility assessment is  
20 supported by the evidence and by clear and convincing reasons.

21 In addition to considering plaintiff's lack of credibility,  
22 the ALJ appears to rely on Dr. Bostwick's more complete picture of  
23 current DAA than Gardner's at the time of Gardner's evaluation  
24 (Tr. 23-24, 27). Dr. Gardner assessed methamphetamine abuse or  
25 dependence in *reported* full and sustained remission, chronic  
26 marijuana abuse, and *apparent* prescription narcotic abuse (Tr.  
27 842)(emphasis added). Dr. Bostwick pointed out the specific  
28 concurrent evidence of drug seeking behavior to obtain

1 prescription narcotics. The evidence shows plaintiff's self-  
2 reported remission is false, and narcotic abuse is actual as  
3 opposed to apparent. This is sufficient "other evidence" to  
4 support the ALJ's reliance on the testifying rather than the  
5 examining psychologist. *See Andrews v. Shalala*, 53 F.3d at 1042-  
6 1043). The ALJ's reasons for adopting the opinion of Dr. Bostwick  
7 with respect to the effects of DAA rather than the contradicted  
8 opinion of the examining psychologist are specific, legitimate,  
9 and supported by substantial evidence. *Flaten v. Secretary of*  
10 *Health and Human Serv.*, 44 F.3d at 1463.

11 *3. Testifying physician Haynes*

12 As indicated, the ALJ found the testimony of Dr. Haynes  
13 persuasive. The ALJ notes

14 "The are compliance issues and Dr. Haynes testified that his  
15 [plaintiff's] gout does not have to be as severe as it has gotten.  
16 Gout is not a disabling disease and the severity of claimant's is  
17 self-inflicted."

18 (Tr. 24, referring to Tr. 84).

19 The ALJ properly credited this opinion as it is consistent  
20 with the bulk of the evidence. Because Dr. Haynes's opinion was  
21 consistent with treating Dr. Goodwin's, the ALJ properly relied on  
22 it. Plaintiff fails to note the record as a whole, including the  
23 opinions of many treating professionals, fully supports the ALJ's  
24 determination Mr. Donovan is disabled when DAA is included, and  
25 DAA is contributing factor material to the disability  
26 determination.

27 *4. Listed impairment*

28 Dr. Haynes testified plaintiff meets Listing 14.09 but it is

1 self-inflicted (Tr. 85). The ALJ found plaintiff disabled when DAA  
2 is included. Whether plaintiff would meet the Listing without DAA  
3 is plaintiff's burden to establish. *Tackett v. Apfel*, 180 F.3d  
4 1094, 1098-1099 (9<sup>th</sup> Cir. 1999). He did not. The ALJ properly  
5 found plaintiff did not meet his burden at step three when DAA is  
6 excluded.

7 Because plaintiff is disabled with DAA included, as the ALJ  
8 found, and DAA materially contributes to the disability finding,  
9 Mr. Donovan is barred from receiving benefits.

10 **CONCLUSION**

11 Having reviewed the record and the ALJ's conclusions, this  
12 court finds that the ALJ's decision is free of legal error and  
13 supported by substantial evidence..

14 **IT IS ORDERED:**

15 1. Defendant's Motion for Summary Judgment (**Ct. Rec. 23** is  
16 **GRANTED**..

17 2. Plaintiff's Motion for Summary Judgment (**Ct. Rec. 20**) is  
18 **DENIED**..

19 The District Court Executive is directed to file this Order,  
20 provide copies to counsel for Plaintiff and Defendant, enter  
21 judgment in favor of Defendant, and **CLOSE** this file.

22 DATED this 28th day of June, 2010.

23 s/ James P. Hutton

24 JAMES P. HUTTON  
25 UNITED STATES MAGISTRATE JUDGE  
26  
27  
28